**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **KIMBERLY P. JOHNSON, personal representative of the Estate of SANDRA S. LOBB, deceased, KRISTEN McDERMOTT,** | : | **CIVIL ACTION** |
| **Plaintiffs,** | : | **NO. 05-2536** |
| **v.** | : | |
| **DIANE KOKEN, Pennsylvania Insurance Commissioner; Dr. CALVIN B. JOHNSON, Pennsylvania Secretary of Health; INDEPENDENCE BLUE CROSS; And THE CHESTER COUNTY HOSPITAL,** | : | |
| **Defendants.** | : | |

**MEMORANDUM**

Plaintiffs link the death of Mrs. Sandra Lobb to the denial of her request for medical benefits by Independence Blue Cross and seek a declaration that certain state-mandated language in contracts between medical insurers and medical providers is unconstitutional. The defendants have filed motions to dismiss.

## I. BACKGROUND

On February 1, 1999, Mrs. Lobb died of kidney failure caused by cirrhosis of the liver. Two and a half years before her death, Lobb was admitted to the Chester County Hospital and diagnosed with alcohol pancreatitis and hepatitis alcohol ketoacidosis. One week after her diagnosis, Mrs. Lobb was discharged from the hospital despite her family's, and allegedly her treating physician's, requests. The plaintiffs, including

Kimberly Johnson (the personal representative of Lobb's estate), now allege that Lobb's death resulted from Independence Blue Cross ("IBC") wrongfully denying her coverage for the treatment she needed and that current IBC contracts with health care facilities wrongfully denied the Lobb family the ability to individually pay those medical facilities for Lobb's care. As a derivative of this claim, the plaintiffs also allege that IBC is practicing medicine without a licence by, in effect, being the final authority on what medical procedures or treatment an insured may receive.

The current Amended Complaint includes Kristen S. McDermott as an additional plaintiff. McDermott is Lobb's daughter, a school teacher like Lobb, and carries the same insurance as did Lobb. McDermott has joined this lawsuit to ensure that IBC does not treat her in the same way it treated her mother. The defendants argue McDermott lacks standing.

This dispute centers around a state-mandated IBC contract clause referred to as a "hold harmless provision." 28 Pa. Code § 9.722(e)(i)-(iii). In the contract involved in this case, the provision reads:

> In no event including, but not limited to, non-payment by the plan, plan insolvency, or a breach of this contract, shall the provider bill, charge, collect a deposit from, seek compensation or reimbursement from, or have any recourse against the enrollee or persons other than the plan acting on the behalf of the enrollee for services listed in this agreement. This provision does not prohibit collecting supplemental charges or co-payments in accordance with the terms of the applicable agreement between the plan and the enrollee.

The hold harmless provision is a part of every contract between IBC and medical providers within the Commonwealth of Pennsylvania and is for the benefit of the insured. The provision guarantees that person's insured by IBC do not have to pay for services rendered in the event that IBC becomes insolvent. Further, the provision may be designed to prevent medical providers from being paid twice for services rendered; once from IBC and once from the insured. In this case, the plaintiffs argue the provision effectively denies them the ability to individually contract with medical providers because the medical provider that treated Mrs. Lobb (the defendant Chester County Hospital) allegedly interpreted the provision as a complete bar preventing Mrs. Lobb, or her family, from ever paying for services.

Although the plaintiff's amended complaint begins by describing the facts leading up to Mrs. Lobb's death, it is clear their claim is more of a prayer that this court declare the hold harmless provision unconstitutional than an attempt to resolve an actual case or controversy arising from Mrs. Lobb's death. By adding McDermott to the amended complaint, the plaintiffs attempt to turn this case into a form of class action on behalf of every person insured by IBC. The plaintiffs assert this case is not about the denial of insurance coverage but instead about IBC practicing medicine without a license and denying its insured the right to individually seek medical treatment.

## II. STANDARD of REVIEW

When considering a motion to dismiss under Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6), the court must accept the complaint's allegations as true and draw all reasonable inferences in plaintiff's favor. Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1164-65 (3d Cir. 1987).

Under Rule 12(b)(6), a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." The rule is designed to screen out cases where "a complaint states a claim based upon a wrong for which there is clearly no remedy, or a claim which the plaintiff is without right or power to assert and for which no relief could possibly be granted." Port Auth. v. Arcadian Corp., 189 F.3d 305, 311-12 (3d Cir. 1999). Under Rule 12(b)(6), a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The issue, therefore, is not whether the plaintiff will ultimately prevail, but whether she is entitled to offer evidence to support her claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); See also Maio v. Aetna, Inc., 221 F.3d 472, 482 (3d Cir. 2000).

## III. DISCUSSION

In this case, the defendants argue the plaintiffs' case should be dismissed because 1) McDermott lacks standing, 2) the case is barred by the statute of limitations, and 3) the claims between plaintiffs and IBC are res judicata.

1. Does McDermott Have Proper Standing?

The plaintiffs argue that McDermott has proper standing in this case for two reasons: 1) she suffered when her mother, Mrs. Lobb, was denied treatment, and 2) she has the same IBC insurance and could therefore be subjected to the same treatment by IBC. The claim is not based on an injury sustained by McDermott, but rather is "grounded" upon her being a Pennsylvania resident and insured by the defendant. Essentially, if McDermott could be added to this suit, so could every other PA resident insured by IBC.

In order to have standing a plaintiff must meet three requirements:

> First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision

AT&T Communications of New Jersey, Inc. v. Verizon New Jersey, Inc., 270 F.3d 162, 170 (3d Cir. 2001) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

In this case McDermott does not meet any of the three requirements. No facts have been plead that an invasion of her ability to freely contract for medical services is either concrete or imminent. McDermott is no different from any other Pennsylvania resident insured by IBC. Although she may be afraid IBC will treat her in the same manner as they have allegedly treated her mother, that fear is insufficient for standing in

this case. No facts have been plead to give this court any reason to believe that McDermott can not freely enter into a contract with any medical service provider and individually pay for all services requested. The fact that Mrs. Lobb may have been prevented from individually contracting for medical services is not enough to give McDermott standing in this case. Mrs. Lobb, not McDermott, claims a denial of coverage and an interference with her ability to individually pay for medical services in 1997.

2. Are the Plaintiffs' Claims Barred by the Applicable Statute of Limitations?

All sides admit the applicable statute of limitations for this suit is two years.[1] The defendants argue that because the actions giving rise to this claim, i.e. the alleged denial of Mrs. Lobb's medical coverage and care, occurred in 1997 and that Mrs. Lobb died in February of 1999, the plaintiffs should have filed this cause of action years ago. The Plaintiffs counter by arguing that the statute if limitations should not have begun to run against them until September 4, 2004, when they overheard oral arguments in an unrelated IBC case and "realized" IBC was violating their constitutional rights.[2] In support of this contention, the plaintiffs argue that they had no way of knowing about the IBC contracts with the medical providers or the state mandated hold harmless provision.[3]

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[1]Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss (Docket # 45), filed October 26, 2005, at page 6.

[2]Attorneys for IBC allegedly admitted that IBC makes actual medical decisions rather than only making coverage decisions.

[3]The plaintiffs' memorandum of law in opposition to the defendants' motions to dismiss even includes a doctor's affidavit stating that he does not know about the alleged effects of the IBC hold harmless provision and as such there was no way for the plaintiffs to know about it either.

The key date for this case, however, is when Mrs. Lobb realized she could not individually contract for medical services, not when the current named plaintiffs became aware of IBC's alleged contract interpretations. If Mrs. Lobb was denied the ability to individually contract for medical services in 1997, then the statute of limitations for a cause of action arising out of that denial also began in 1997. It does not matter when the plaintiffs found out about the insurance contracts or IBC's possibly contradictory position regarding its perceived role as a coverage versus treatment decision maker. The alleged violation of constitutional rights occurred when Lobb was denied the ability to pay for medical services. The plaintiffs admit they had actual knowledge of the alleged denial at the time it occurred. Thus, the two-year statute of limitations on this case began in 1997 and the case is now time-barred.

3. Are the Plaintiffs' Claims Against IBC Barred by Res Judicata or the Rooker-Feldman Doctrine?

The Superior Court of Pennsylvania recently affirmed the Court of Common Pleas of Chester County's grant of a motion for summary judgment filed by Independence Blue Cross against Kimberly Johnson.[4] IBC avers the plaintiffs are trying to re-litigate the same claims dismissed by the Chester County Court through the present cause of action. The plaintiffs argue this federal case is completely different and poses new questions before the court.

[4]The Superior Court decision is designated as Non-precedential, was filed on November 4, 2005, and is unpublished. It is filed at Superior Court Number 1310 EDA 2004, Appeal from the Order Entered on April 12, 2004 In the Court of Common Pleas, Chester County Civil Division, No. 01-01070.

In the state cause of action against IBC, the beginning of plaintiff Kimberly Johnson's "Summary of the Argument" section in her Pennsylvania Superior Court brief reads:

> The case is not about a denial of insurance by the Defendant. It is about the Defendant's use of contractual provisions in its contracts with health care providers to infringe the [sic] Mrs. Lobb's ability to independently contract for care the Defendant refused to provide under the terms of the [sic] Mrs. Lobb's Policy. The provider contracts contain state mandated "hold harmless" language and are regulated, reviewed and approved by the Commonwealth of Pennsylvania. In essence, Defendant, acting in concert with and pursuant to Pennsylvania Insurance Department regulation, had no authority to interfere with the [sic] Mrs. Lobb's ability to, acting solely on their own and relying on their own ability to pay, contract for the services of her doctor or the care that she and her family and their doctor believe was appropriate, particularly when the Defendant had refused to provide that care under the terms of the [sic] Mrs. Lobb's health care insurance policy. . . . The issue goes to the very core of our individual rights under the Constitution.

The claims being asserted by plaintiff Johnson, as the personal representative of Mrs. Lobb's estate, appear to be the same as the claims asserted in this case. The parties and facts are identical, and the issues considered by the Court of Common Pleas of Chester County and by the Superior Court are strikingly similar to those raised in this action:

> I. Whether the [Chester County] Court erred in failing to take into account the fundamental right of an insured to freely and independently contract and pay for medical care and treatment without interference from its health insurance company when the insurance company through its practices, policies and state sanctioned provider agreements (which are withheld from its insured), 1) set aside her contractual and confidential relationship with and [sic] her personal physician and 2) Infringed her right to contract and pay for care that the insurance company refused to provide as a covered benefit under her policy?

> II. Whether the court's ruling that the state approved provider contracts are unambiguous creates an unconstitutional interference with patient's right to freely contract with her physician/health care provider?
> III. Whether the Court erred by granting summary judgment when there are significant disputed material facts which should have precluded summary judgment?
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> Unpublished Superior Court opinion at 5.

"[T]he three prong test for the application of res judicata to a given action requires (1) a final judgment in a court of competent jurisdiction in the earlier case, (2) the assertion of the same cause of action in the two cases at issue, and, (3) the presence of the same parties or their privies in both lawsuits." Avins v. Moll, 610 F. Supp. 308, 316 (E.D. Pa. 1984). In this case, the state court's decision is res judicata as to the claims raised by the plaintiff. All three requirements set out in Avins are present. See also County of Lancaster v. Philadelphia Elec. Co., 386 F. Supp. 934 (E.D. Pa. 1975) (holding that res judicata prevented plaintiffs from relitigating not only their claims raised during the state court cause of action, but also the constitutional claims the plaintiffs should have raised).

Alternatively, the Rooker-Feldman doctrine[5] may be applicable if the plaintiffs are seeking to overturn the state courts' decisions.

> A federal district court has jurisdiction over general constitutional challenges if these claims are not inextricably intertwined with the claims asserted in state court. A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state decision or void its ruling. Accordingly, to determine whether Rooker-Feldman bars [plaintiff's] federal suit requires determining exactly what the state court held. . . If the relief requested in the federal action requires determining that the state court decision is wrong or would void the state court's ruling, then the issues are inextricably intertwined and the district court has no subject matter jurisdiction to hear the suit.

FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996) (citing Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir. 1995) (citations omitted)). In this case, the first and second issues decided by the Pennsylvania Superior Court are the same issues the plaintiffs seek to resolve here. In order for this Court to grant the relief requested by plaintiffs, this Court must either ignore or overturn the state

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[5] The Rooker-Feldman doctrine is based on the statutory provision that grants the Supreme Court jurisdiction to review the decisions of the highest state courts for compliance with the Constitution. See 28 U.S.C. § 1257. Because this jurisdiction is reserved exclusively to the Supreme Court, it is improper for federal district courts to exercise jurisdiction over a case that is the functional equivalent of an appeal from a state court judgment. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923). As this court recently explained: When a plaintiff seeks to litigate a claim in a federal court, the existence of a state court judgment in another case bars the federal proceeding under Rooker-Feldman only when entertaining the federal court claim would be the equivalent of an appellate review of that order. For that reason, Rooker-Feldman applies only when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render that judgment ineffectual. Ernst v. Child and Youth Servs. of Chester County, 108 F.3d 486, 491 (3d Cir. 1997) (citing FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d at 840 (citations omitted)).

courts' judgments. According to the Rooker-Feldman doctrine, this Court does not have the ability to so act.

## IV. CONCLUSION

The plaintiffs complain that IBC's hold harmless contract provision destroys an individual's right to contract and pay for medical treatment. The one incident the plaintiffs cite in which this may have happened occurred in 1997 when Mrs. Lobb was allegedly prevented from paying for her treatment. The plaintiffs had actual knowledge of the denial at the time it occurred, and there is no legitimate discovery rule issue as to the statute of limitations. The plaintiffs' claims are time-barred. They have no right to bring their claim or present evidence in support of their claim. Furthermore, the plaintiffs' claim is likely barred by the doctrine of res judicata, and by the Rooker-Feldman decisions. Plaintiffs raise the same claims in this case as in state courts, where their claims were decided by the Chester County Court of Common Pleas and affirmed in the Pennsylvania Superior Court. Rooker-Feldman prohibits the use of federal courts to "appeal" state court decisions. Here, the relief sought in federal court is the same as that sought in the Chester County action. The defendants' motions to dismiss are hereby granted. An appropriate order follows.

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| **Defendants.** | : | |

**ORDER**

**AND NOW,** this day of December, 2005, upon consideration of the defendants' Motions to Dismiss the plaintiffs' second amended complaint (Docket #'s 40, 41, and 42), it is hereby **ORDERED** that the motions are **GRANTED**. The plaintiffs' case is dismissed in its entirety and with prejudice. The Clerk of the Court shall mark this case as closed for all purposes.

BY THE COURT:

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LAWRENCE F. STENGEL, J.